

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-2310

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

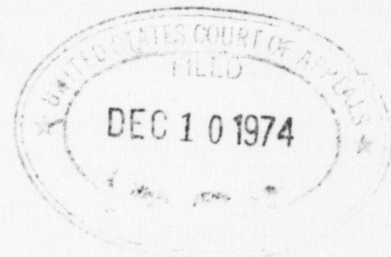
Appellee,

-against-

JOHN RUFUS ETHERIDGE,

Appellant.

Docket No. 74-2310



APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel

PAGINATION AS IN ORIGINAL COPY

p. 163

CRIMINAL DOCKET

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U. S.: Woodfield

63.

JOHN RUFUS ETHERIDGE

For Defendant Legal Aid
26 Court St., B'klyn N.

Did impersonate a Federal Official

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DATE	PROCEEDINGS
9/13/73	Before WEINSTEIN, J. - Indictment filed
9-21-73	Before Mishler, Ch J - Case called - deft not present - counsel Legal Aid present - pleading adjd to Oct. 10, 1973 at 9:45 am.
10-10-73	Before MISHLER, CH J - Case called - deft not present - counsel Simon Chrein of Legal Aid present - Bench Warrant Ordered/Issued
11-9-73	Bench warrant ret'd and filed - Executed
11-9-73	Before MISHLER, CH. J. - Case called - Deft and counsel present - Bench warrant vacated - Deft arraigned and entered plea of not guilty - Def O.R. - 11-27-73 set down for trial
11-13-73	Bench warrant ret'd and filed - executed
11-27-73	Before MISHLER, CH J - Case called - deft not present - counsel Edward Kelly of Legal Aid Society present - Bench Warrant ordered and stayed until Nov. 20, 1973.

PROCEEDINGS

- 11-29-73 Bench warrant issued
- 5-2-74 Before MISHLER, CH.J.- Case called- Deft and counsel present- Deft produced in court on a bench warrant- bail set at \$5,000 P/R/ bond- Deft to appear in court on 5-10-74 at 4:00 P.M. for trial- Writ satisfied
- 5-3-74 Bench Warrant retd and filed - executed .
- 5-6-74 Govts Memorandum of Law filed.
- 5-7-74 Stipulation of Facts filed.
- 5-8-74 Memorandum of Law filed
- 5-10-74 Waiver of Jury Trial filed.
- 5-10-74 Before MISHLER, CH J - case called - deft & counsel S.Chrein of Legal Aid present - Waiver of jury trial signed and approved by the Court - trial ordered and begun (non-Jury) facts stipulated to were placed on the record - Trial concluded - Decision Reserved.
- 6/7/74 Before MISHLER, CH.J.- Case called- Deft and counsel present- Case was the court without a jury on stipulated facts and the court finds the deft guilty as charged
- 6-7-74 By MISHLER, CH J - Memorandum of Decision and Order filed -court finds the deft guilty as charged.
- 6-20-74 Stenographers transcript filed dated May 10, 1974.
- 6-20-74 By MISHLER, CH J - Order filed amending Memorandum of Decision- Stipulations of fact were inadvertently omitted from the Court's Memorandum of Decision and order dated June 7, 1974 (#13 and #14) (see Order for details) Ordered that the above stipulations as indicate to the court's memorandum of decision dated June 7, 1974.
- 8-14-74 Letter to chambers from S. Chrein of Legal Aid filed re: adjournment of sentence to 9-13-74
- 8-23-74 Before Mishler, CH - sentence adjd to 9-13-74 on consent
- 9-13-74 Before MISHLER, CH.J.- Case called- Deft and counsel present- Sentence to 9-27-74- Hearing set down for 9-27-74 at 2:00 P.M.
- 9-27-74 Before Mishler, Ch J - case called - deft & counsel present - hearing waived - on consent of the deft the sentence is adjd to Oct. 4, 1974.
- 10/4/74 Before MISHLER, CH.J.- Case called- Deft and counsel present- Imposition sentence is suspended and the deft is placed on probation for a period of 3 years- Court advised of his right to appeal- Clerk to file notice of appeal- Probation stayed to the filing in this court of the mandate of the court appeals
- 10/4/74 Judgment and Order of Probation filed- certified copies to Probation

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U. S. DISTRICT COURT E.D. N.Y.

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TIME A.M.
P.M.

73 CR 830

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

JOHN RUFUS ETHERIDGE,

Defendant.

INDICTMENT

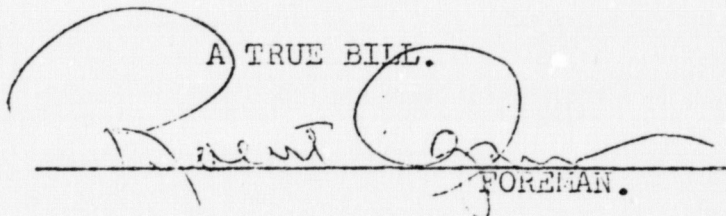
Cr. No.
(T. 18 U.S.C., §912).

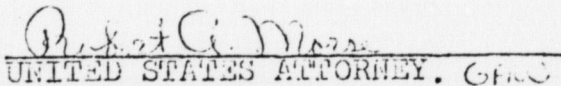
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THE GRAND JURY CHARGES:

On or about the 23rd day of July 1973, in the Eastern District of New York, the defendant JOHN RUFUS ETHERIDGE, knowingly and wilfully, with intent to defraud, did falsely assume and pretend to be an employee of the United States acting under the authority thereof, that is, a Sergeant in the United States Army, and in such pretended character did demand and obtain the sum of approximately Two Hundred Dollars (\$200.00), in United States Currency. (Title 18, United States Code, Section 912).

A TRUE BILL.


FOREMAN.


UNITED STATES ATTORNEY. GAW

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U. S. DISTRICT COURT E.D. N.Y.

JUN 7 1974

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

No. 73-CR-830

- against -

Memorandum of Decision

JOHN RUFUS ETHERIDGE,

Defendant.

June 7, 1974

The defendant is charged with a violation of 18
/1
U.S.C. §912. The indictment alleges that defendant falsely
assumed and pretended to be "an employee of the United States
acting under the authority thereof, that is, a Sergeant in
the United States Army, and in such pretended character did
demand and obtain the sum of approximately Two Hundred Dollars
(\$200.00) in United States Currency." The case was tried to
the court without a jury on stipulated facts. For the reasons
stated below, the court finds the defendant guilty as charged.

/1 28 U.S.C. §912 provides as follows:

Whoever falsely assumes or pretends to be an officer
or employee acting under the authority of the United
States or any department, agency or officer thereof,
and acts as such, or in such pretended character
demands or obtains any money, paper, document, or
thing of value, shall be fined not more than \$1,000
or imprisoned not more than three years, or both.

9

The following facts were stipulated and agreed to by the defendant and the Government:

1) On July 23, 1973 John R. Etheridge went to Headquarters Company of the United States Army Chaplain School, Fort Hamilton, Brooklyn, New York and there obtained a request for leave form which he completed.

2) Etheridge then proceeded to the Identification Section where he obtained a temporary ID card after explaining to the personnel that he was a current member of the Army on leave and had his wallet with all identification stolen.

3) Next, Etheridge went to Army Emergency Relief where he submitted an application for financial assistance, identifying himself as a current member of the U.S. Army, 552 Engineers, Fort Knox, Kentucky with a home of record as 4165 Farlin Avenue, St. Louis, Missouri.

4) At Army Emergency Relief Etheridge informed employees that he required financial assistance because he was a member of the Army on a 30 day leave (as indicated on the leave form he had previously obtained and completed) and was robbed on July 21, 1973 of his wallet which contained \$175 in currency, Military ID card, and

various credit cards. Etheridge stated that he needed \$200 to pay his hotel bills and return to Kentucky.

5) At this time, Etheridge was in possession of papers from the New York City Police Department, 25th Precinct, indicating that he had lost his wallet on July 21, 1973.

6) Etheridge also had in his possession the temporary ID card he had obtained at Fort Hamilton previously on this day, July 23, 1973.

7) Army Emergency Relief authorized a loan to Etheridge for \$200 which was given to him in the form of a check on July 24, 1973. Etheridge cashed this check at the Post Exchange at Fort Hamilton.

8) On July 24, 1973 Etheridge again returned to the Identification section at Brooklyn Army Terminal where he obtained a permanent U.S. Army duty identification card.

9) Etheridge then proceeded to the Base Finance Office and received \$65 in partial pay.

10) On July 26, 1973 Etheridge again went to the Base Finance Office attempting to obtain another partial pay. At this time he was detained by the Criminal In-

vestigation Division who advised him to surrender to the F.B.I.

11) On July 27, 1973 Etheridge surrendered himself to the F.B.I. at which time he gave a full statement of the foregoing facts.

12) Throughout the time of these events Etheridge was not a member of the U.S. Army.

The defendant concedes that he pretended to be a Sergeant in the United States Army and, through such pretext, obtained an Army Emergency Relief loan of \$200.00. The defendant, however, contends that such conduct falls outside of the ambit of §912 since he "at all times acted in an overtly personal capacity, that is to obtain a personal loan." Citing United States v. Barnow, 239 U.S. 74, 36 S.Ct. 19 (1915) and United States v. Lepowitch, 318 U.S. 702, 63 S.Ct. 914 (1943), the defendant interprets §912 as proscribing a demand for money or things of value made pursuant to the duties of the pretended office or employment. It is true that in Barnow and Lepowitch convictions for such activities were sustained. This court, however, does not construe §912 that narrowly, nor does it interpret Barnow and Lepowitch as so circumscribing the statute.

Defendant also cites United States v. Milton, 421 F.2d 486 (10th Cir. 1970). The court finds Milton inapposite. There, the trial court held that defendant's false representation of federal employment was sufficient in and of itself to support a judgment of conviction, even in the absence of evidence that the defendant "ever requested the money or used his authority as an FBI agent to get it." 421 F.2d at 587. In reversing, the court of appeals stated that:

We have held that the statute states two separate and distinct offenses. One is that of assuming and pretending to be an officer or employee of the United States and acting as such. The other is demanding or obtaining any money, paper, document, or other valuable thing in such pretended character. Shepherd v. United States, 10 Cir., 191 F.2d 682, 683, and Elliott v. Hudspeth, 10 Cir., 110 F.2d 389, 390. Here, the only charge was that of obtaining money in the pretended character.

. . .

The trial court misconceived the charge made in the indictment when it said that the question of obtaining money was not before it and that the only question was whether the defendant represented himself as a federal employee. A finding of representation alone does not satisfy either the statute or the indictment. The offense was not committed unless the money was obtained "in such pretended character." The court failed to recognize this essential element of the offense.

The gravamen of an offense under §912 is the use of a false and pretended relationship in order to obtain money

or something of value. United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950, 70 S.Ct. 478. In the instant case, defendant received financial assistance because he represented himself to be a member of the United States Army. This case is distinguished from United States v. York, 202 F.Supp. 275 (E.D. Va. 1962) and United States v. Grewe, 242 F.Supp. 826 (W.D. Mo. 1965), also cited by defendant. In York, the district court, in finding that the defendant's conduct did not fall within the prohibitions of §912,^{/2} stated that:

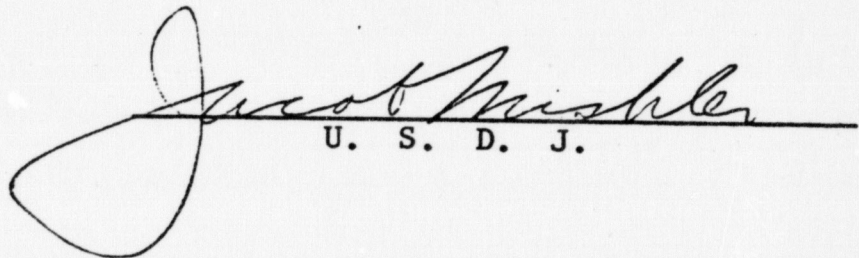
She did not ask the credit manager for credit because she was an employee of the F.B.I. and she was in no sense acting in the pretended character of an employee of the F.B.I. She had asked for the dress and for credit before the question of employment ever came up. She merely thought that she would be more apt to get the dress if she stated that she had some employment and her status as an applicant for a job with the F.B.I. was the nearest thing to a job that she had.^{/3}

202 F. Supp. at 277. Grewe was to the same effect.

^{/2} The defendant in York, a teen-age girl, falsely represented that she was an employee of the FBI when in fact she had merely applied for that position in order to obtain credit in a retail store.

^{/3} In Grewe, the defendant paid her hotel bill with her personal check and under her signature added "United States Army A Department," advising the manager of the hotel that she was employed by the United States Army, Audit Department. She then cashed five additional checks. The court dismissed the indictment on the authority of United States v. York.

The court finds the defendant guilty as charged.


U. S. D. J.

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JUN 20 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.
P.M.

UNITED STATES OF AMERICA

73 CR 830

-against-

JOHN RUFUS ETHERIDGE,

ORDER AMENDING
MEMORANDUM OF DECISION

Defendant.

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The following stipulations of fact were inadvertently omitted from this court's memorandum of decision and order dated June 7, 1974:

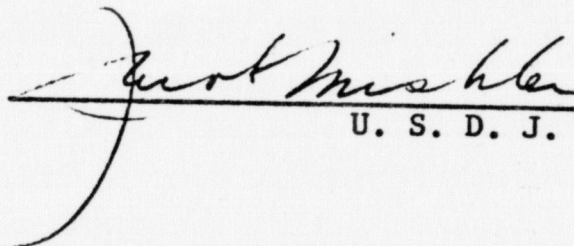
13. Monies of the Army Emergency Relief are not United States Government funds. Only active duty and retired military personnel and their dependents are entitled to Army emergency relief monies.

14. Etheridge completed and signed an allotment document agreeing that \$200.00 be withdrawn from his August 1973 Army paycheck and be repaid to Army emergency relief.

It is hereby

ORDERED that the above stipulations be added

to this court's June 7th memorandum of decision and
order.


U. S. D. J.

Certificate of Service

December 10, 1974

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Shirley Prost